

Date of Hearing: April 23, 2019

ASSEMBLY COMMITTEE ON JUDICIARY

Mark Stone, Chair

AB 1184 (Gloria) – As Amended March 25, 2019

As Proposed to be Amended

SUBJECT: PUBLIC RECORDS: WRITING TRANSMITTED BY ELECTRONIC MAIL:
RETENTION

KEY ISSUE: SHOULD PUBLIC AGENCIES RETAIN EMAILS RELATING TO THE
PUBLIC'S BUSINESS FOR A PERIOD OF AT LEAST TWO YEARS, UNLESS ANOTHER
STATUTE OR REGULATION REQUIRES A LONGER PERIOD?

SYNOPSIS

The California Public Records Act (CPRA) requires public agencies to make any public records in their possession available for inspection unless a provision of the CPRA or another statute exempts the record from public disclosure. However, the CPRA only requires public agencies to disclose records relating to the public's business that they have in their possession; it says nothing about how long public agencies must keep those documents in their possession or when or under what circumstances they may destroy them. However, while the CPRA does not generally address retention issues, there are nonetheless about thirty retention statutes that appear elsewhere in the Government Code. Retention requirements vary depending upon the nature of the record. While outside of the CPRA proper, these retention statutes nonetheless profoundly implicate the CPRA, because public agencies can only disclose the records that they retain.

This bill addresses the question of how long public agencies must retain electronic writings or emails. Government Code Section 34090 prohibits city departments from destroying public records that are less than two years old. However, as detailed in the analysis, some local governments claim that emails are not subject to the two-year retention requirement. The confusion appears to stem from the fact that while CPRA defines a public record to include emails, the several retention statutes do not do so expressly. This bill seeks consistency between the CPRA, which deals with the disclosure of public records, and other provisions of the Government Code that deal with the retention of public records. Specifically, the bill would require a public agency to retain for at least two years any electronic writings relating to the conduct of the public's business, unless another statute or regulation requires a longer retention period. In short, if a writing pertains to the people's business, the retention period is the same whether the writing is paper or electronic. The key issue for purposes of disclosure and retention, therefore, is not the form but the content of the writing.

A diverse coalition of newspapers, journalists, welfare rights organizations, the California Immigrant Policy Center, and the First Amendment Coalition support this bill because it will protect public access to records by treating emails the same as paper records. Groups representing local governments and special districts oppose the measure, claiming that it is an unfunded mandate that will impose costs on local agencies while doing little to improve access to public records. The author will take a clarifying amendment in this Committee, as reflected in the summary and analysis below.

SUMMARY: Requires a public agency to retain and preserve for at least two years every writing containing information relating to the conduct of the public's business that is prepared, owned, or used by the public agency and transmitted by electronic mail or other similar messaging system, unless a statute or regulation requires a longer retention period.

EXISTING LAW:

- 1) Requires, under the California Public Records Act (CPRA), that public records be open for inspection and copying at all times during the office hours of the state or local agency and provides that every person may inspect any public record, unless a specific statute exempts the record from public disclosure. (Government Code Sections 6253 and 6254.)
- 2) Defines "public records" for CPRA purposes to include any writing containing information relating to the conduct of the public's business that is prepared, owned, used, or retained by any state or local agency, regardless of physical form or characteristics. Defines a "writing" to include any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored. (Government Code Section 6252 (e) and (g).)
- 3) Authorizes, unless otherwise provided by law, the head of a city department to destroy any city record, document, instrument, book, or paper, under the department head's charge, without making a copy thereof, after the same is no longer required. Specifies, however, that this does not authorize the destruction of any record affecting title to real property or liens thereon, court records, records required to be kept by statute, *records less than two years old*, and the minutes, ordinances, or resolutions of the legislative body or of a city board or commission. (Government Code Section 34090.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: The California Public Records Act requires public agencies to make any public records in their possession available for inspection unless a provision of the CPRA or another statute exempts the record from public disclosure. However, the CPRA only requires public agencies to disclose any records relating to the public's business that they have in their possession; it says nothing about how long public agencies must keep those documents in their possession or when or under what circumstances they may destroy them. However, while CPRA does not address retention issues, there are nonetheless about thirty retention statutes found elsewhere in the Government Code. Retention requirements vary depending upon the nature of the record. While falling outside of the CPRA proper, these retention statutes nonetheless profoundly implicate the CPRA, because public agencies can only disclose the records that they retain. (Note: Some commentators call "retention" statutes "destruction" statutes, in that they authorize agencies to destroy records, but only after a certain period. The analysis uses "retention" to refer to both.)

This bill addresses the question of how long public agencies must retain electronic writings, or emails. Government Code Section 34090 prohibits city departments from destroying public records that are less than two years old. However, as detailed in the analysis, some local governments claim that emails are not subject to the two-year retention requirement. The

confusion appears to stem from the fact that while the CPRA expressly defines a public record to include electronic writings, the several retention statutes are not uniformly clear on this. This bill seeks consistency between the CPRA, which deals with the *disclosure* of public records, and other provisions of the Government Code that deal with the *retention* of public records. Specifically, the bill would require a public agency to retain for at least two years any electronic writings relating to the conduct of the public's business, unless another statute or regulation requires a longer retention period. In short, if a writing pertains to the people's business, the retention period is the same whether the writing is paper or digital, or whether it is transmitted by email or by snail mail. The key issue for purposes of the CPRA and retention statutes, therefore, is not the form but the content of the writing.

Do retention statutes already cover electronic writings? While the CPRA clearly includes electronic writings within its definition of "public records," the several retention statutes in the Government Code are not quite as clear. For example, Government Code Section 34090 *et seq.* prohibits city departments from destroying any "records less than two years old," unless the department maintains a duplicate copy. Neither the Article nor the Title in which this section appears defines "records." Apparently, a number of California cities have concluded that the "records" referred to Section 34090, unlike the definition of "public records" in CPRA, does not apply to emails or other electronic writings. For example, the nonprofit news organization Voice of San Diego surveyed several cities in San Diego County and found that many cities assume that the two-year retention rule does not apply to emails, with at least two cities (Encinitas and Poway) deleting emails after only 30 days. ("These Cities Can Hardly Wait to Delete Their Records," March 20, 2018, at www.voiceofsandiego.org.) Some of the cities that Voice of San Diego surveyed believed that the emails did not qualify as disclosable public records because they were "preliminary drafts," or internal memoranda otherwise not subject to disclosure under CPRA. It may be true that many emails may constitute preliminary drafts not subject to disclosure; however, the exemption for preliminary drafts is not a blanket, unqualified exemption. According to subdivision (a) of Government Code Section 6254, "preliminary drafts" and internal memoranda are only exempt from public disclosure "if the public interest in withholding these records clearly outweighs the public interest in disclosure." Even emails that constitute a preliminary draft may still be subject to disclosure.

The author of this bill believes that to ensure meaningful access we should clarify existing law so that public agencies retain emails relating to the public's business for at least two years, as they do paper records. If the emails are in fact preliminary drafts, or qualify for some other exception, then the city does not need to disclose them. One reason, after all, for requiring agencies to retain records for a minimum period is because they might be relevant to a future and valid public records request. As the author points out, email has become one of the primary means by which public servants conduct their work and communicate with one another. For some time now, electronic writings have been rapidly displacing writings on paper, which is why in 2004 the Legislature amended the definition of "public record" by specifying that "writing," for purposes of the CPRA, included electronic writings. (AB 1933 (Pacheco), Chap. 937, Stats. 2004.) However, there is no way to balance those competing public interests if the record is gone.

It appears that some courts have already moved in the direction of applying retention statutes to emails. For example, last year the San Diego Superior Court issued a stipulated order that authorized the San Diego Unified School District (SDUSD) to delete non-archived emails in SDUSD employee's Outlook boxes, "except that the procedure shall be modified so that only

emails that are older than two years at the time of deletion may be automatically deleted.” (*Voice of San Diego v. San Diego Unified School District* (Case No. 37-2018-00026433-CU-WM-CTL, May 30, 2018, p. 2.) The stipulated order only applied to the agency’s automatic deletion procedure, it did not necessarily prevent SDUSD employees from deleting email from their individual accounts, unless they were required to retain by law. (*Id.* at 3.)

However, like any stipulated order, the order of San Diego Superior Court, while premised on the assumption that emails were subject to retention statutes, only applied to the parties in that particular case. This bill will make it clear that because emails are potentially public records subject to disclosure under the CPRA, they logically should also be subject retention statutes outside of the CPRA.

Proposed Author Amendment: In order to clarify that an agency must retain emails *at least* two years, *but longer if an applicable statute requires a longer retention period*, the author will take the following amendment in this Committee:

- On page 2 delete lines 3-5 and insert:

Unless a longer retention period is required by statute or regulation, a public agency shall for the purpose of this chapter retain and preserve for at least two years, every writing containing information relating to the conduct of the public’s business that is prepared, owned, or used by the agency and transmitted by electronic mail or other similar messaging system.

ARGUMENTS IN SUPPORT: The San Diego Pro Chapter of the Society of Professional Journalists (SD-SPJ) supports AB 1184 because it “will require local jurisdictions to keep email communications on file for a minimum of two years.” SD-SPJ notes that even though current law authorizes the destruction of public records after two years, some “local jurisdictions have argued that current law is unclear regarding email record retention requirements.” For example, SD-SPJ first “raised alarm bells after the chapter learned the San Diego Unified School District intended to delete staff emails and only archive emails for a one-year period.” In response to pressure and litigation, “the school district updated its policy to retain emails for two years. We believe this two-year requirement was a victory for the public. AB 1184 clarifies existing email retention policy by requiring localities to retain all emails for a two-year period. By extending this requirement to all emails, AB 1184 removes the arbitrary and potentially inadequate degree to which emails are preserved. In 2019, emails are the primary way public servants conduct their work and as it stands today, these same employees have the discretion to determine which emails they retain or delete. This self-policing approach may result in the deletion of the kinds of emails subject to disclosure under a public records act request. AB 1184 removes unnecessary guesswork by requiring all emails to be kept for two years.”

The California News Publishers Association (CNPA) supports AB 1184 (as amended). CNPA contends that a “clear minimal standard for the retention and preservation of electronic mail is necessary as many local agencies routinely and automatically purge email communications on a weekly or monthly basis. Their reasoning for doing so is based on the fact that the California Public Records Act and most of the existing record retention statutes do not specifically address the time frame for the destruction of these ephemeral communications.” The problem however, according to CNPA, “is that in their eagerness to purge these records from their servers, agencies can dispose of records that could provide the public with insights into the development of public policy, illuminate controversial decisions as well as hide evidence of corruption and self-

dealing.” CNPA concludes, “AB 1184 would require agencies to retain electronic documents in the same manner that they would be required to handle any other document and provide clear guidance to agencies, journalists and members of the public as to what the appropriate standards are for the custodians of this information.”

ARGUMENTS IN SUPPORT IF AMENDED: The First Amendment Coalition (FAC) supports “the goal of . . . Assembly Bill 1184, which would provide badly needed clarity for the minimum amount of time, two years, that state and local agencies must retain email communications under the [CPRA].” However, FAC is concerned that “the current wording of the bill could override various sections of the Government Code and other statutes that may require email communications to be retained more than two years.” FAC proposes amending the bill so that it establishes a *minimum* retention of two years, “but does not abrogate other statutes and regulations that require longer retention periods.” [Note: The amendment that the author will take in this Committee appears to address FAC’s concern.]

ARGUMENTS IN OPPOSITION: In a joint letter of opposition, the California Special Districts Association (CSDA), League of California Cities (LCC), California Downtown Association (CDA), and the Association of California Healthcare Districts (ACHD) oppose AB 1184 because “it is not a transparency bill, it is a data storage bill.” These opponents claim that AB 1184 “places an unfunded mandate on public agencies by amending the California Public Records Act (CPRA) to store every transmitted email for at least two years. This bill creates no new disclosures or exemptions of records. The public will have no greater access to public records, nor will they have less. This bill only requires public agencies to spend money on data storage, and by placing the provision in the CPRA the State will avoid constitutional requirements to reimburse public agencies for the data costs associated with the higher level of service required by the bill.” Opponents see “no value to saving out-of-office emails, auto-reply emails, or insignificant emails that are not subject to disclosure under the CPRA for two years, but under this bill, public agencies will have no choice.”

The El Dorado Irrigation District (EID) “opposes AB 1184 due to the significant costs it would impose on a local agency.” EID contends that such “costs will not be reimbursed under the bill as a state mandate, which means water and wastewater rates will be increased to pay for the mandated records retention. The largest cost of increasing message retention will be functional labor in the form of legal and administrative staff who must wade through each and every electronic mail to find required information to satisfy a public record request.” EID adds, “CPRA already creates significant burdens on EID and other local agencies in terms of staff time responding to requests. Given the volume of electronic mail generated, a mandatory retention period of two years would place even greater burdens on agencies in terms of reviewing and identifying relevant e-mail.”

REGISTERED SUPPORT / OPPOSITION:

Support

California Immigrant Policy Center
 California Newspaper Publishers Association
 Coalition of California Welfare Rights Organizations
 San Diego Pro Chapter of the Society of Professional Journalists

Support if Amended

First Amendment Coalition

Oppose

Association of California Healthcare Districts

California Downtown Association

California Special Districts Association

City of Stanton

City of West Hollywood

Downtown Center Business Improvement District

El Dorado Irrigation District

League of California Cities

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